

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
Implementation of Section 302 of the)	
Telecommunications Act of 1996)	
Open Video Systems)	CS Docket No. 96-46
)	
Time Warner Cable)	
Petition for Reconsideration)	

ORDER ON RECONSIDERATION

Adopted: July 24, 1998

Released: August 4, 1998

By the Commission:

I. INTRODUCTION

1. Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), pursuant to Section 1.429 of the Commission's rules,¹ filed a petition for reconsideration of the Commission's Fourth Report and Order in *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*² ("Fourth Report and Order"). In the *Fourth Report and Order*, the Commission revised its filing requirements for applications for open video system certification and for oppositions and comments to such applications. Time Warner asserts that in addition to the modifications adopted in the *Fourth Report and Order*, the Commission should have required open video system certification applicants to provide certain information not currently required to be provided in an FCC Form 1275 Open Video System certification application.³ RCN Telecom Services, Inc. ("RCN") filed an opposition to the petition and the Bell Atlantic Companies⁴ and the NYNEX Telephone companies⁵

¹47 C.F.R. § 1.429(d). The Commission issued a public notice of Time Warner's petition for reconsideration on July 10, 1997, FCC Public Notice, Rep. No. 2210, and notice of the petition was published in the Federal Register on July 15, 1997, 62 Fed. Reg. 37911.

²12 FCC Rcd 7545 (1997).

³FCC Form 1275 - Certification for Open Video Systems, OMB No. 3060-0700.

⁴The Bell Atlantic Companies are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., and Bell Atlantic Video Services Company.

⁵The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

(collectively, "Bell Atlantic/NYNEX") filed a joint opposition. Time Warner filed a consolidated reply.

II. BACKGROUND

2. On February 8, 1996, the Telecommunications Act of 1996⁶ added Section 653 to the Communications Act of 1934, establishing open video systems as a new framework for entry into the video programming marketplace.⁷ Section 653 required the Commission, within six months after the date of enactment of the 1996 Act, "[to] complete all actions necessary (including any reconsideration) to prescribe regulations" to govern the operation of open video systems.⁸ On March 11, 1996, the Commission issued a *Report and Order and Notice of Proposed Rulemaking*⁹ ("Notice") regarding open video systems. Based upon the record developed in response to the *Notice*, the Commission adopted *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*¹⁰ ("*Second Report and Order*") in which it prescribed rules and policies establishing streamlined regulations governing open video system certification and operation. In response to petitions for reconsideration of the *Second Report and Order*, the Commission adopted *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*¹¹ ("*Third Report and Order*") which addressed issues raised in those petitions and also addressed the definition of "affiliate" in the context of open video systems.¹²

3. Based upon the Commission's experiences in open video system certification proceedings, the *Fourth Report and Order* was adopted to revise "procedures for both the filing of certification applications and the filing of comments and oppositions to provide for the most efficient processing of applications for open video system certification, given the limited 10-day statutory deadline for deciding certification applications."¹³ The *Fourth Report and Order* did not modify substantive open video system obligations. Rather, the *Fourth Report and Order* instructed open video system certification applicants to provide a properly formatted computer diskette along with their Form 1275 applications¹⁴ and required open video system applicants to indicate clearly on the mailing envelope and in a cover sheet whether the

⁶Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, ("1996 Act").

⁷Communications Act of 1934, as amended, § 653, 47 U.S.C. § 573 ("Communications Act").

⁸47 U.S.C. § 573(b), (c).

⁹CS Docket No. 96-46 and CC Docket No. 87-266 (terminated), 61 FR 10496 (March 14, 1996), FCC 96-99, released March 11, 1996.

¹⁰11 FCC Rcd 18223 (1996).

¹¹11 FCC Rcd 20227 (1996).

¹²The Commission sought comment on the definition of "affiliate" in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 (Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996) ("*Cable Reform Proceeding*"), 11 FCC Rcd 5937 (1996).

¹³*Fourth Report and Order*, 12 FCC Rcd at 7546.

¹⁴*Id.*, 12 FCC Rcd at 7546-7547.

open video system filing is a certification application, Notice of Intent, or channel carriage complaint.¹⁵ The order further required that comments and oppositions to an open video system certification application be filed simultaneously with the Office of the Secretary and the Chief of the Cable Services Bureau, within five calendar days of the date of filing of the open video system application.¹⁶ The Commission also modified filing procedures by stating that intermediate holidays will be counted in determining the due date for filing of comments and oppositions.

III. THE PARTIES

4. Time Warner is a cable system operator and provider of video programming services to open video systems.¹⁷ Bell Atlantic, through its subsidiary, has been certified to operate an open video system in Dover Township, New Jersey.¹⁸ NYNEX is a regional bell operating company operating in the Northeast region of the country.¹⁹ RCN, through its subsidiaries, has been certified to operate open video systems in the City of New York, including the boroughs of Manhattan, Brooklyn, Queens, Staten Island, and the Bronx²⁰ and in the City of Boston, Massachusetts and forty-seven surrounding Massachusetts communities.²¹

IV. POSITIONS OF THE PARTIES

5. Time Warner asserts that the Commission should modify its open video system certification procedures to require an applicant to: (1) demonstrate that it will provide a nondiscriminatory open video system platform that will be accessible to unaffiliated video programming providers and that it will serve all potential customers within a defined open video system service area;²² (2) provide documentation that it has obtained prior approval from local authorities to construct facilities occupying public rights-of-way;²³ (3) disclose the precise boundaries of the territory it proposes to serve;²⁴ (4) submit

¹⁵*Id.*, 12 FCC Rcd at 7546-7547, 7549. *See also* 47 C.F.R. § 76.1503 (an open video system operator is required to file with the Commission a Notice of Intent which states the operator's projected channel capacity, service area, manner of soliciting and determining the level of demand for carriage on its system and other technical information) and 47 C.F.R. § 76.1513(e) (any party aggrieved by an open video system operator's conduct with regard to rates, terms and conditions of carriage may file a complaint).

¹⁶*Id.*, 12 FCC Rcd at 7547, 7548.

¹⁷*See Time Warner Cable*, DA 98-798, (Cab. Serv. Bur. rel. April 28, 1998).

¹⁸*See Bell Atlantic-New Jersey, Inc.*, DA 96-2040 (Cab. Serv. Bur. rel. Dec. 2, 1996).

¹⁹*See n. 5, supra.*

²⁰*See Residential Communications Network of New York, Inc.*, DA 97-453 (Cab. Serv. Bur. rel. Feb. 27, 1997).

²¹*See RCN-BETG, LLC*, DA 97-454 (Cab. Serv. Bur. rel. Feb. 27, 1997).

²²Petition at 3.

²³*Id.* at 14.

a detailed construction timetable and facility route map;²⁵ (5) file its Notice of Intent within ten days after the date the open video system certification is granted;²⁶ (6) permit video programming providers to enroll in its system even if the operator's initial period for such enrollment has ended;²⁷ (7) provide unused channel capacity available to video programming providers on an 18-month basis rather than on a three-year basis as currently required by the Commission's rules;²⁸ and (8) impose public, educational, and governmental ("PEG") obligations that automatically will apply where an open video system applicant, prior to filing an open video system certification application, has been unable to reach agreement with the relevant local authorities regarding PEG access.²⁹

6. Time Warner maintains that the revisions it requests to the open video system certification process will reduce, and not increase, the administrative burdens on Commission staff and on all parties. Time Warner further maintains that its proposals will only require the open video system applicant to attach appropriate documentation to its application which evidences approval by the appropriate local authority or authorities, agreement on franchise fee and PEG access obligations, and agreement on a construction timetable and build-out requirements. Time Warner argues that delaying such approvals and agreements until after open video system certification invites post-certification disputes and delay in the provision of open video system service.

7. In further support of its argument, Time Warner states that the Commission's previous grants of open video system certification to Metropolitan Fiber Systems of New York, Inc. ("MFS")³⁰ and to Digital Broadcasting OVS, Inc. ("DBOVS")³¹ demonstrate that the information requirements contained in the open video system certification application are inadequate.³² With regard to MFS, Time Warner alleges that MFS denies access to its open video system to unaffiliated programmers pursuant to its arrangement with affiliate Residential Communications Network which MFS uses as its sole programming source. Time Warner further asserts that MFS chose to provide open video system service to a relatively

²⁴*Id.* at 11.

²⁵*Id.*

²⁶*Id.* at 12.

²⁷*Id.* at 13.

²⁸*Id.*

²⁹*Id.* at 20.

³⁰*Metropolitan Fiber Systems of New York, Inc., d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc.*, 11 FCC Rcd 20896 (1996), *Metropolitan Fiber Systems of New York, Inc., d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc.* are jointly referred to as "MFS."

³¹*Digital Broadcasting OVS Certification to Operate an Open Video System*, DA 96-1703, 11 FCC Rcd 12854 (1996) ("*DBOVS Order*").

³²Petition at 9. To the extent that Time Warner believes that MFS, RCN, and DBOVS are violating Commission rules governing open video system operations, the Commission has in place complaint procedures pursuant to Section 653(a)(2) of the 1996 Act and Section 76.1513 of the Commission's rules, 47 C.F.R. § 76.1513.

small number of multiple housing units within its open video system service area, *i.e.*, New York City and Boston, which are more likely to be occupied by high-income residents. With regard to DBOVS, Time Warner alleges that DBOVS has no plans to construct open video system facilities to service any homes in the areas in which DBOVS has been certified to provide open video system service.

8. In opposition, RCN argues that Time Warner seeks a back-door reconsideration of the Commission's initial order implementing its open video system regulations (the *Second Report and Order*) and, consequently, the Commission should dismiss Time Warner's petition as time-barred because the period for a timely petition for reconsideration of that order ended in July 1996. RCN alternatively argues that, to the extent Time Warner's petition seeks reconsideration of the *Fourth Report and Order*, it should be dismissed because it raises issues that are outside the scope of the matters addressed in that order. For example, RCN points out that with regard to Time Warner's proposal that open video system applicants obtain prior local governmental approval, the Commission specifically rejected prior approval as a condition of open video system certification in the *Second Report and Order*.³³ RCN states that the Commission is without authority to consider the issues raised by Time Warner's petition because they directly address substantive open video system operating requirements while the *Fourth Report and Order* addresses only procedural open video system application requirements.³⁴

9. RCN further argues that if Time Warner's petition is granted the Commission would violate Section 553(b)(A) of the Administrative Procedures Act ("APA").³⁵ Under Section 553(b)(A), certain proceedings which relate to agency organization, procedure or practice are exempt from notice and comment requirements.³⁶ RCN states that the Commission found that the procedures adopted in the *Fourth Report and Order* "are purely ministerial and do not alter the rights of the parties."³⁷ RCN maintains that Time Warner seeks to alter the substantive obligations of open video systems and not merely the manner in which existing open video system certification requirements are met, and that this would require the initiation of a notice and comment rulemaking proceeding.

10. In opposition to Time Warner's petition, Bell Atlantic/NYNEX argue that Time Warner does not seek reconsideration of any of the issues raised by the Commission in the *Fourth Report and Order*.³⁸ Rather, Bell Atlantic/NYNEX assert that the rules which Time Warner seeks to change were promulgated by the Commission in the *Second Report and Order* and in the *Third Report and Order*.³⁹

³³*Id.* at 7 citing *Second Report and Order*, 11 FCC Rcd at 18247.

³⁴RCN Opposition at 10.

³⁵U.S.C. § 553 (b)(A).

³⁶*Id.*

³⁷RCN Opposition at 2 citing *Fourth Report and Order*, 12 FCC Rcd at 7546.

³⁸Bell Atlantic/NYNEX Opposition at 1.

³⁹*Id.* at 2. Bell Atlantic/NYNEX state that petitions for reconsideration of those orders were due on July 5, 1996 and September 20, 1996, respectively.

11. In its consolidated reply, Time Warner asserts that its petition is responsive to the *Fourth Report and Order* because it suggests procedural modifications in addition to those adopted in that order.⁴⁰ Time Warner further asserts that the Commission's statement that the *Fourth Report and Order's* procedural modifications were based on recent experiences of open video system certification proceedings makes Time Warner's petition timely because it would have been impossible to raise these issues prior to the grant of an open video system certification by the Commission.

12. Time Warner further states that both RCN and Bell Atlantic/NYNEX imply that Time Warner is without standing to file a petition for reconsideration of the *Fourth Report and Order*. Time Warner argues that Section 553(e) of the APA⁴¹ permits petitions for reconsideration of all agency rulemakings, even if notice and comment were not required in the initial rulemaking, where all interested parties have received proper notice and have been afforded an opportunity to comment.⁴² Time Warner further argues that its petition for reconsideration finds support in Section 405(a) of the Communications Act and Section 1.429(a) of the Commission's rules,⁴³ both of which provide for reconsideration of agency action.

V. DISCUSSION

13. Time Warner argues that the Commission's *Fourth Report and Order* should be modified to incorporate substantive changes in the obligations imposed on open video system certification applicants. The purpose underlying the *Fourth Report and Order*, however, was not to modify substantive open video system certification obligations, but solely to address certain procedural requirements. In its petition, Time Warner does not contest any of the revised open video system certification application procedures adopted in the *Fourth Report and Order*. Instead, Time Warner argues that the Commission should significantly modify the substantive obligations of open video system operators which are outside the scope of the *Fourth Report and Order*. The Commission's rules and Federal court precedent clearly establish that the subject matter of petitions for reconsideration of Commission action must relate to the

⁴⁰Reply at 3.

⁴¹5 U.S.C. § 553(e).

⁴²Reply at 6. Section 553(e) of the APA states that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

⁴³Communications Act § 405(a), 47 U.S.C. § 405(a) (any party or aggrieved person may file a petition for reconsideration of an agency order, or action made or taken in any proceeding). 47 C.F.R. § 1.429(a) (any interested person may file a petition for reconsideration of agency final action).

scope of the matters addressed in the underlying proceeding. Section 1.429(c) of the Commission's rules provides that:

The petition for reconsideration shall state with particularity the respects in which petitioner believes the *action taken* should be changed.⁴⁴

The United States Court of Appeals for the District of Columbia Circuit, in discussing the proper scope of reconsideration proceedings, has stated that:

If the petitioners want the [Federal Communications] Commission to reconsider the rationale underlying its use of the prime rate for [Allowance for Funds Used During Construction] AFUDC generally, then they must petition the agency to initiate a rulemaking in the usual manner. The petitioners cannot require the Commission to expand the scope of its proceeding through a petition for reconsideration. For the court to countenance the petitioners' attempt to secure review of a policy mentioned only tangentially, in a proceeding that does not comprehend the possibility of changing that policy, would be to join in a procedural entrapment too clever by half. The result would be a novel form of judicial review unbounded by facts or record; indeed there is no record whatsoever in this proceeding on the propriety of the prime rate, and the carriers did not seek before the agency to make one. Obviously, we too must decline to consider the merits of the petitioners' arguments on this subject.⁴⁵

14. Specifically, Time Warner argues that the *Fourth Report and Order* should be modified to require open video system certification applicants to provide additional information and documentation not currently required by the Commission's rules. The *Fourth Report and Order* did not address the substantive portions of Section 76.1502 of the Commission's rules which prescribes the specific information which must be provided and the representations that must be made by an applicant for open video system certification.⁴⁶ Time Warner further argues that the *Fourth Report and Order* should be modified to revise the rules governing the carriage of video programming providers on open video systems. The *Fourth Report and Order* did not address the substantive portions of Section 76.1503 of the Commission's rules which governs the notification to and enrollment of video programming providers on open video systems⁴⁷ or Section 76.1504 which governs the rates, terms, and conditions for carriage

⁴⁴47 C.F.R. § 1.429(c) (emphasis added); see also 47 C.F.R. § 1.106(b)(1) ("any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the *action taken*"). (emphasis added).

⁴⁵*Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990). In this regard, Time Warner may file a petition for rulemaking proposing modifications to the Commission's open video system regulations. See 47 C.F.R. § 1.401.

⁴⁶47 C.F.R. § 76.1502.

⁴⁷47 C.F.R. § 76.1503.

of video programming on open video systems.⁴⁸

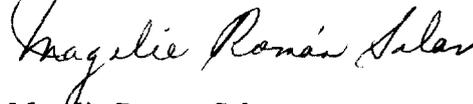
15. Time Warner next argues that the *Fourth Report and Order* should be modified to amend the Commission's rules governing local approval requirements, franchise fees, and PEG access obligations of open video system operators. The *Fourth Report and Order* did not address Section 76.1505 which pertains to PEG access obligations⁴⁹ or Section 76.1511 which pertains to franchise fee obligations of open video system operators.⁵⁰ With regard to prior local approvals, as RCN and Bell Atlantic/Nynex have pointed out, the Commission specifically rejected prior approval as a condition of open video system certification in its *Second Report and Order*.⁵¹ The *Fourth Report and Order* did not address the Commission's position regarding such prior local approvals.

16. Thus Time Warner's petition for reconsideration relates exclusively to matters wholly outside the scope of the *Fourth Report and Order*. Its petition for reconsideration of that order must be denied.⁵²

VI. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the petition for reconsideration of the *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, FCC 97-130, filed by Time Warner Cable, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁴⁸47 C.F.R. §76.1504.

⁴⁹47 C.F.R. §76.1505.

⁵⁰47 C.F.R. §76.1511.

⁵¹See n. 33, *supra*.

⁵²We agree with RCN and Bell Atlantic/NYNEX that Time Warner's petition for reconsideration relates directly to the subject matter of the Commission's *Second Report and Order* and *Third Report and Order*. Time Warner did not seek reconsideration of those orders.